IN THE SPECIAL COURT FOR THE TRIAL OF NIA CASES, ERNAKULAM
Present: Sri. Anil.K.Bhaskar, Judge for NIA Cases

Wednesday the 9th day of September, 2020/ 18th Bhadrapada, 1942

Crl.MP No.55/2020 & Crl.MP No.56/2020 in SC 01/2020/NIA

Crl.MP No.55/2020

Petitioner/Accused No.1:	Allan Shuaib (A1), age 20 years, S/o. Mohammed Shuaib, Manipoori House, Palattu Nagar, Thiruvannur, Kozhikode
	By Adv. Sri.Isac Sanjay
Respondent/Complainant :	Union of India represented by National Investigation Agency, Kochi.
	By Adv. Sri. Arjun Ambalappatta Public Prosecutor, NIA

Crl.MP No.56/2020

Petitioner/Accused No.2:	Thwaha Fasal(A2), age 24 years, S/o. Abubacker, Kottummal House, Moorkanad, Pantheerankavu, Kozhikode.
	By Adv. Sri.Thushar Nirmaly Sarathy
Respondent/Complainant :	Union of India represented by National Investigation Agency, Kochi.
	By Adv. Sri. Arjun Ambalappatta Public Prosecutor, NIA

These Criminal M.Ps coming on for hearing before me on 09.09.2020 and the Court on the same day passed the following:

COMMON ORDER

1. These two applications for regular bail filed under Section 439 Cr.P.C, by the accused 1 and 2 in the above case, are being conveniently disposed of by this common order.

2. Crl.M.P. No.55/2020 is filed by the first accused Allen Shuhaib and Crl.M.P. No.56/2020 is filed by the second accused Thwaha Fasal.

3. Notice served to the Special Public Prosecutor. Separate written objections were filed opposing the bail applications.

4. As per the final report filed by NIA, these two accused along with the third accused Usman who is absconding, are charged for the offences punishable under Section 120B of IPC and Sections 38 and 39 of Unlawful Activities (Prevention) Act, 1967. In addition to that the second accused is charged for the offence under Section 13 of the UA(P) Act. To be precise, the memorandum of charge goes this way;

a) Accused 1 to 3 had knowingly and intentionally, associated themselves and acted as members of Communist Party of India (Maoist), proscribed as a terrorist organisation by the Government of India under Section 35 of the Unlawful Activities (Prevention) Act, 1967 and included in the first schedule to the Act, thereby committed the offence punishable under Section 38 of the UA(P) Act.

b) Accused 1 to 3 had knowingly and intentionally, possessed documents supporting and published by CPI (Maoist), possessed digital devices and other materials with the intention of supporting the proscribed terrorist organisation and propagating its violent extremist ideology and thereby committed the offence punishable under Section 39 of the UA(P) Act.

c) Accused 1 to 3 had knowingly and intentionally, attended various conspiracy meetings along with other underground part time and professional members of CPI (Maoist). They had also attended various programmes organised by the frontal organisations of the proscribed terrorist organisation, for furthering the objectives of CPI (Maoist) and thereby committed the offence punishable under Section 120 B of IPC.

d) Accused No.2 in furtherance of the conspiracy with co-accused and others, had knowingly and intentionally, prepared cloth banners supporting secession of Kashmir from the Indian Union, for displaying at public place and thus committed the offence of unlawful activity punishable under Section 13 of UA(P) Act.

5. The route map of the case is as follows:-

On 01.11.2019 at about 18:45 hours the police patrolling party headed by SI of Police, Pantheerankavu Police station spotted the three accused on the road side at Kottayithazam, in Kozhikode city standing

together under suspicious circumstance. On seeing the police, A3 Usman took to his heels and could not be apprehended. The police had taken custody of A1 and A2 the petitioners herein. At that time the first accused was carrying a shoulder bag and the second accused a red plastic file. Upon search, nine items were seized from the shoulder bag of the first accused. They are

1. *A notice in Malayalam titled Professor Madhava Gadgil Committee report nadappilakuka (Implement Professor Madhav Gadgil Report).*
2. *A notice in Malayalam tilted "Maoist Veetekkethire Janangal Rangathiranguka" (People should rise against Maoist Hunt) by Jogi, Spokesperson, CPI (Maoist), Paschima Ghatta Prathyeka Meghala Committee" (Western Ghats Special Zonal Committee).*
3. *A notice in Malayalam tilted "Puthiya Munnettangalkkayi Thayyaredukkuka, (Prepare for New Advancements) October 28, 29, 30 Wayanad Collectorattil Rappakal Maha Dharna" (Day and Night Maha Dharna at Wayanad Collect orate).*
4. *A handwritten paper with scribble "Malabar Motham 17" and ending with word "Student".*
5. *A handwritten paper with writings "Reporting – 2" which ends as "Porayama Undakunnathu Swabhavikam" having four pages serial*

numbered from 1 to 4.

6. *A spiral bound note pad of "SPIROPAD No. 4150 Janvi" with some writings in code language.*

7. *A letter pad having 06 pages and light blue colour cover page with writings "Vimarshana Swathatryam Thiricchu Pidikkuka" (Regain Freedom to Criticize) "Swathatra Lokam 2017 Deshiya Seminar".*

8. *A monthly Magazine "Maruvakk Rastriya Samskarika Masika" of October 2019 Volume – 4, Edition – 10 having 50 pages.*

9. *A pocket diary having 09 pages.*

6. Two items recovered from the red plastic file of the second accused, are the following;

10. *A book with heading "Indiayile Jathiprasnam Nammude Kazhchapadu – May dinam 2017" (Caste issues in India, our views – May day 2017) – published by Central Committee of CPI (Maoist).*

11. *A book in Malayalam language with heading "Sankatana Janadhipathyam – Leninodulla Viyojanangal" (Organizational democracy, disagreement with Lenin) of Rosa Luxemberg.*

7. Police immediately arrested accused 1 and 2 from the spot and thereafter registered a case under Sections 20, 38 and 39 of UA(P) Act as crime No.507/2019 of Pantheerankavu Police Station alleging that the accused persons are members of CPI (Maoist) a banned terrorist

organisation.

8. On the same night itself the houses of both A1 and A2 were searched in their presence. While so, the second accused had shouted slogans in support of Maoisem and Extremist ideology.

9. From the house of the first accused a *mobile phone* was seized.

10. From the house of the second accused around 18 items were seized. They are

1. A Diary of 2018.

2. A book with heading "Indiayile Jjathiprasnam Nammude Kazhchapadu – May dinam 2017" (Caste issues in India, our views – May day 2017) – published by Central Committee of CPI (Maoist).

3. Pamphlets with heading "Sathruvinte Adavukalum Nammude Prathyakramana Adavukalum (Enemies tactics and our counter tactics) – 18 sheets.

4. A book titled "Hello Bastar, India Maoist Prasthanattinte Parayappadatta Katha" (Hello Bastar, the Untold story of Indian Maoist Organization) written by Rahul Panditha.

5. A book titled "Mundur Ravunni – Thadavarayum Porattavum" (Mundur Ravunni – Imprisonment and fight) written by Madula Mani.

6. A book titled "Indonesian Janankale Fasist Bharanadhikarikale

Marichidan Vendi Onnikkuka Poraduka" - (Peoples of Indonesia, Join together and Fight to knock out the Fascist Ruler).

7. A book with outer cover writings "TRIVENI Special" and writings inside.

8. A Book with outer cover writing "CLASSMATE": and having writings inside.

9. One page ruled paper having writings "Jammu Kashmirinte Swathanthrya Porattathe Pinthunakkuka" (support the freedom struggle of Jammu Kashmir).

10. One page paper having writings "Pattaya Preshnam Collectorateil Ottayal Porattam (Land document issue, one personal strike at Collectorate).

11. A printed pamphlet with title "Vivadamaya Maradu Flat Samuchayangal Polichuneekuka" (Demolish the controversial flats at Maradu).

12. *Printed Notice having printing starts with "sakhakkalakk" (to comrades) and ends with "area committee" and A4 size notices with writings "Jammu Kashmirinmelulla Adhnivesham Avasanipikuka" (stop the control on Jammu and Kashmir) and ends with "Paschima Ghatta Prathyeka Mekhala Committee" (Western Ghats Special Zonal Committee (dated 2018 Aug 6 – 15 Nos, found kept inside a folded newspaper of Mathrubhumi daily*

dated 2019-Oct-4-.

13. *Two Red colour Banners 180 cms x 87 cms with printing in Yellow colour "Jammu Kashmirinte Swanthanthra Poratathe Pinthunakkuka, Kashmiril Adhinivesha Vazhcha Nadathunna Indian Bharana Koodathe Cherukkuka, Bhrahmanya Hindutwa Fascist Bharana Varganthinethire Kalapam Cheyuka: CPI (Maoist)" (Support the freedom struggle of Jammu Kashmir, Oppose the control of Indian Government at Jammu Kashmir, do struggle against Hindu Brahmin fascist Government).*

14. *One laptop with charger,*

15. *Mobile phone with SIM,*

16. *Two additional SIM cards,*

17. *Three memory cards,*

18. *Two Pen Drives*

11. The investigating officer had also collected some paint/ paper like materials found on the inside wall of the house of the second accused, said to be the residue of the banner prepared by the second accused.

12. A1 Allen Shuhaib was a student of School of Legal Studies, Palayad Campus of Kannur University at Thalassery. For the purpose of his studies he was residing there as a paying guest in a nearby house. From the said house, as pointed out by the first accused, the investigating officer had recovered two notebooks which contained the writings of A1 in

Malayalam. The investigating officer had also seized the hard disk of a computer attached to Rasberry Books House which is said to have been used by the first accused. The investigating officer had sent all the electronic gadgets seized, for forensic examination and extraction of its contents. The paint/paper like materials seized from the house of the second accused were sent for chemical examination.

13. FSL report pertaining to the electronic gadgets seized from the house of A1 and A2 has already been received. As far as A1 is concerned, as pointed out by the prosecution, the objectionable items retrieved are; a video clip with title Kashmir bleeding, portraits of Communist Revolutionary leaders like Cheguvera and Mae Tse Tung, and that of Geelani, a Kashmiri separatist leader, poster images titled "let us pretend everything is in normal in Kashmir, fraternity movement poster, rise up for rojava, Kurdisthan solidarity network Kerala, condolence to Geelani, ban UA(P)A, Maoist encounter, Kashmir terrorism, save Madhani's life, take action against Turkey's fascism, Stop Turkish state war against Kurds etc. The pdf files extracted are regarding abrogation of Article 370 of Indian Constitution, Kashmir resistance day, Speaking about Turky issue, Speaking about Kurd militants and books on democracy, Marxist ideologies, Islam ideology etc. which also include the book "Great Russian Revolution". Two voice clips with title "Internationale" and "Pagabati" were also recovered. It had photos which revealed that A1 had attended the protest gathering conducted in

October 2019 organized by Kurdisthan Solidarity network, Kerala, said to be a frontal organization of CPI (Maoist). Prosecution wound say that identical PDF format of the book "Great Russian Revolution" and the two above mentioned voice clips were extracted from the digital devices seized in Agali Police Station Crime 291/19 (Crime 495/19 of Crime Branch HQ, Thiruvananthapuram) related to encounter with PLGA (Maoist) at Agali.

14. As far as A2 is concerned, the objectionable items retrieved, as pointed out by the prosecution, are Images of CPI (Maoist) flag, file related to the Constitution of Central Committee CPI (Maoist), the files related to CPI (Maoist) Central Committee programme, magazine named "kattuthee" of CPI (Maoist), image of hanging Prime Minister Modi, various newspaper cuttings related to Maoist incident, photo of Maoist leader Roopesh (who is an accused in NIA case and in judicial custody) and other material related to CPI (Maoist). It is reported that the soft copy of one of the book seized from the possession of A2 during his arrest titled "Indiayile Jathi Prasnam Nummude Kazhchhappadu – May Dinam 2017" has been found in a digital device seized in Agali Police Station Crime 291/19 (Crime 495/19 of Crime Branch HQ, Thiruvananthapuram) related to encounter with PLGA (Maoist) at Agali.

15. Prosecution got extracted the facebook accounts, email accounts of both the accused and also collected the call detail records of the mobile numbers in use by the accused, but it doesn't contain much

evidence, incriminating in nature.

16. Prosecution was able to collect documentary evidence to prove that A3 Usman is involved in three crimes registered with Mananthavady, Pullpally and Thirunelli Police station as crime No.178/2013, 67/2013 and 77/2013 respectively, all cases coming under UA(P)Act in relation to the activities of banned CPI (Maoist) Party. Prosecution was also able to collect photos of the accused 1 and 2 actively participating in the various protest meetings organised by the so called frontal organisations of CPI (Maoist) party. This is the overall picture of the documentary evidence collected by the investigating agency and relied upon by the prosecution.

17. FSL report with regard to the hard disk attached to Rasberry Book house and the chemical report with regard to paint/paper like materials seized from the house of the second accused, have not yet received.

18. To speak about the oral evidence, the investigating officer had recorded the statements of many number of witnesses particularly to prove the arrest of the accused 1 and 2 from the place of occurrence, seizure of the objectionable items from the possession of accused 1 and 2, shouting of slogan by A2 supporting Maoist ideology, that all the three accused had met together at another place on the same day before proceeding to the scene of occurrence, that A3 Usman frequently visited A1 at the place where A1 was residing as a paying guest, that all the accused are very much attracted to extremist ideology, and that the accused 1 and 2 had pointed out the

places wherein they had carried out secret meetings.

19. Earlier part of the investigation was conducted by Kerala Police. After arrest, accused 1 and 2 were produced before the Principle Sessions Court, Kozhikode and they were remanded to judicial custody. While so, both the accused moved for bail as Crl.M.P No.1789/2019 and the Sessions Court dismissed the same, finding that there exist prima facie materials in support of the charge. Both the accused challenged the impugned order before the Hon'ble High Court by filing separate appeals as Crl.Appeal Nos.1300/2019 and 1301/2019. The Hon'ble High Court dismissed the appeals by a common order, taking a prima facie view that there are sufficient materials against the accused to continue an investigation for the offences under UA(P) Act and release of the appellants at this stage of investigation may hamper or adversely affect the furtherance of the same. With regard to the observation made by the Sessions Judge that *there is prima facie materials to attract the offence punishable under Section 38 of the UA(P) Act*, the Hon'ble High Court commented as follows:- "*We neither affirm nor defer from the view taken by the learned Sessions Judge regarding the nature of offence prima facie revealed at this stage against the appellants. It may be too early to pronounce on the culpability of the accused and if so under which provision of law*".

20. Subsequently the investigation of the case was entrusted with NIA by the order dated 16.12.2019, of the Ministry of Home Affairs,

Government of India. Accordingly crime was re-registered. Accused were later produced before this court and thereafter they continues to be in the judicial custody of this court. While so, the second accused moved an application for bail before this court as Crl.M.P No.16/2020. That application was dismissed by this court finding that, from the materials made available, the accusation against the petitioner (A2) appears to be prima facie true and it will not be proper to grant bail to the petitioner (A2) at this stage when the investigation is still in progress.

21. On 27.04.2020 the NIA filed final report before this court against all the three accused. Acting upon the said final report this court took cognizance of the offence and the case was taken on file as SC No.1/2020 against three accused named in the final report. The third accused Usman is still at large. Subsequently investigating officer filed Crl.M.P.No.37/2020 on 04.05.2020 and obtained formal permission from this court under Section 173(8) of Cr.P.C for further investigation, mainly to probe the involvement of other persons if any. Now further investigation is going on.

22. In the meanwhile the investigating agency had preferred two applications, one for taking the voice sample of the second accused to substantiate the prosecution case that it was the second accused who had shouted the slogans favouring Maoism at the time of the search of his house and the other one for sending the specimen handwriting of both the accused already taken, for comparison with the writings in the note books

seized from their possession. The application to take voice sample stands allowed and the voice sample has been collected today from the court.

23. Both the accused 1 and 2 are in judicial custody from 02.11.2019 onwards.

24. In the present bail applications moved after the submission of the final report, following contentions are taken up. Firstly, the prosecution failed to collect sufficient materials to prove a prima facie case against the petitioners/accused. It is pointed out that the petitioners are not shown to be, - or even alleged to be – involved in any acts of violence, or any terrorist acts. There is no convincing evidence to prove that they are members of CPI (Maoist) party. Secondly, the petitioners are very young. A1 is a student pursuing law and A2 a student of journalism. Considering this, further incarceration shall be avoided and the petitioners are ready to abide whatever lawful conditions imposed by this court. Thirdly it is submitted that, the petitioner/first accused is having some psychiatric issues and was under treatment of Dr.Varsha Vidyadharan, Assistant Professor in Psychiatry, Government Medical College, Calicut and the treatment is to be continued. Lastly it is submitted that, probably, petitioners due to their inquisitiveness and quest for knowledge, would have reached out to the books relating to various ideologies including extremist ideology, but this can never be taken as an act aiding and abetting terrorism.

25. The prosecution opposed both the applications. Learned

Prosecutor contended that the investigation agency was able to collect sufficient materials to substantiate the charge against the accused. The oral evidence as well as the documentary evidence are overwhelming. The statements of the protected witnesses and the contents of the protected documents fully support the prosecution case. There is ample evidence to prove that the accused had actively associated and supported CPI (Maoist) the banned terrorist organization to further its activities. Earlier applications for bail were rightly dismissed by the trial court as well as the Appellate court finding that there is prima facie evidence to substantiate the prosecution charges. Be it so, Section 43D (5) and (6) of UA(P) Act pose a statutory bar in granting bail to the accused. It is submitted that if the petitioners are released on bail, most likely they will abscond and they will physically join the People's Liberation Guerrilla Army and may wage war against the nation. There is every likelihood that they may continue their underground activities to support the banned terrorist outfit thereby acting against the national security and sovereignty. The learned Prosecutor would submit that the young age of the accused doesn't deserve any sympathetic consideration. It is pointed out that the age for becoming a member of CPI (Maoist) party is just 16 years and the members in their prime youth are more prone to violent activities. It is submitted that if the accused are released on bail they will tamper with the evidence and terrorize the witnesses.

26. The points that arise for consideration are:-

1. Whether accused 1 and 2 are entitled to be released on bail pending trial of the case?

2. Orders to be passed.

27. **Point Nos.1 and 2**:- Chapter XXXIII of Cr.P.C (Sections 436 to 450) contains provisions in respect of bail and bonds. Section 436 Cr.P.C, with which this chapter open makes an invariable rule for bail in case of bailable offences subject to the specified exceptions under sub-sec. (2) of that section. Section 437 Cr.P.C provides as to when bail may be taken in case of non-bailable offences. Sub-sec. (1) of S.437 Cr.P.C makes a dichotomy in dealing with non-bailable offences. The first category relates to offences punishable with death or imprisonment for life and the rest are all other non-bailable offences. With regard to the first category S.437 (1) Cr.P.C imposes a bar to grant of bail by the court or the officer in charge of a police station to a person accused of or suspected of the commission of an offence punishable with death or imprisonment for life, if there appear reasonable grounds for believing that he has been so guilty. S.437 is concerned only with the court of Magistrate. It expressly excluded the High Court and the Court of Session. S.439 (1) Cr.P.C, on the other hand, confers special power on the High Court or the Court of Session in respect of bail. Unlike under S.437(1) there is no ban imposed under S.439(1) Cr.P.C, against granting of bail by the High Court or the Court of Session to persons

accused of an offence punishable with death or imprisonment for life. The change of language only mean that the High Court and Sessions Judge enjoy wide powers in granting bail, but it doesn't mean that the Sessions Judge need not even bear in mind the guidelines which the Magistrate has necessarily to follow in considering bail of an accused. The overriding consideration in granting bail are common both in the case of S.437(1) and S.439(1) Cr.P.C. **[Reference: Gurcharan Singh and other v. State (Delhi Admn) AIR 1978 SC 179].**

28. There is no definition of bail in the code, although the term "bailable offence" and "non-bailable offence" have been defined. Bail has been defined in *law lexicon* as security for the appearance of the accused person on giving which he is released pending trial or investigation. As per Black's Law dictionary what is contemplated by bail is "to procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court". The provisions relating to bail have been enacted with a view to restoring liberty to the arrested person without jeopardizing the objectives of arrest. It is always to be remembered that the object of detention pending criminal proceedings is not punishment and that law favours allowance of bail which is the rule, and refusal of it is an exception.

29. Where the arrestee is accused of a serious crime and the nature of the evidence against him is such that he is likely to be convicted

and punished severely, it would be plausible to presume that he would be prone to abscond or jump bail in order to avoid trial and the consequential sentence. In such a case, it would be rather unwise to release him on bail. Further, where the accused person, if released on bail, is likely to put obstruction in having a fair trial by destroying the evidence or by tampering with the prosecution witnesses, or where the accused person is likely to commit more offence during the period of his release on bail it would be improper to release such a person on bail. Section 437(1)(i), referred above, gives an indication in this regard.

30. Now a days terrorism has become the most worrying feature of contemporary life. India has been one of the most vulnerable targets of terrorism. Terrorism is definitely a criminal act, but it is much more than mere criminality. Therefore, terrorism is a new challenge for law enforcement. To face terrorism we need new approaches, techniques, weapons, expertise and of course new laws. India addressed the issue of terrorism through various enactments and executive measures. That is why the anti-terrorist statutes – the earlier Terrorism and Disruptive Activities (Prevention) Act 1987 (TADA), then Prevention of Terrorism Act 2002 (POTA) and now the amended Unlawful Activities (Prevention) Act were brought in force, which contain stringent provisions limiting and restricting the powers of the court in granting bail to the persons involved in terrorist activities. Section 43D (5) and (6) of Unlawful Activities (Prevention) Act

reads as follows:-

> (5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapter IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:
>
> Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.
>
> (6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

31. Be it so, when it comes to offences punishable under UA(P) Act, something more is to be kept in mind by the court, in view of the special provisions contained in Sec. 43(D) of the Act. At the same time, the court has equal responsibility to see that human rights are not violated in the process of combating terrorism. In all cases, the fight against terrorism must be respectful to the human rights. Hon'ble Apex court in **PUCL v. Union of India (2004 (9) SCC 580)** observed that *"Our Constitution laid down clear limitations on State actions within the context of the fight against terrorism.*

To maintain this delicate balance by protecting "core" human rights is the responsibility of court in a matter like this".

32. Thus the law of bails has to dovetail two conflicting demands, namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence *viz*. the presumption of innocence of an accused till he is found guilty. (Reference: **Shafi N. v. State of Kerala (2019 KHC 5653) – Kerala High Court**)

33. Essentially granting of bail is discretionary. It is well settled that *discretion* when applied to a Court of Justice, means sound discretion guided by law, rules and principles as laid down by the court and judicial decisions. While exercising the discretion, the court has to balance the mitigating and aggravating circumstances. The variables are numerous. It all depends upon the facts and circumstances of each case. Generally, while making a decision regarding grant of bail the court has to consider *(i) Whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the accusation; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of*

the witnesses being influenced; and (viii) danger, of course, of justice being thwarted by grant of bail. ***(Prasanta Kumar Sarkar v. Ashish Chatterjee: AIR 2011 SC 274).***

34. With this prelude, I will proceed further. Major part of the arguments were addressed on the question whether the prosecution was able to make out a prima facie case against the petitioners/accused. Before going further, it is to be made clear that *the exercise to be undertaken by the court at this stage – of giving reasons for grant or non-grant of bail is – markedly different from discussing merits or demerits of the evidence. The elaborate examination or discussion of the evidence is not required to be done at this stage. The court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.*" (Hon'ble Apex Court in **NIA v. Zahoor Ahmad Shah Watali**; **AIR 2019 SC 1734**). In other words the duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. It is a finding tentative in nature, which may not have any bearing on the merits of the case. In the above cited decision, Hon'ble Apex Court observed that "*By its very nature, the expression "**prima facie true**" would mean that materials/evidence collected by the investigating agency in reference to the accusation against the concerned accused in the first information report, must prevail until contradicted and overcome or disproved by other*

evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted."

35. To explain it further, if a rational and reasonable doubt is felt in that regard, then the court could not be precluded from granting bail even in such cases. Moreover judging the existence of a prima facie case at the stage of bail, would not be the same as judging the existence of a prima facie case for proceeding against an accused by framing charge. It is too obvious that an accused would never be required to put forth a stronger case for bail, than that would be required for a discharge. The tests that are applied at the time of bail cannot be as rigorous as are applied while considering the discharge of an accused from a particular case. The standard of "prima facie true" was lower than the standard of reasonable grounds. (Ref: **A.Ramachandran @ Raman v. Central Bureau of Investigation: 2015 (3) KHC 678 : Ker HC)**

36. The gravest among the offences charged against the accused are those under Sections 38 and 39 of UA(P) Act. Sections 35 to 40 comes under Chapter VI of the said Act. As per Section 35, the Central Government is empowered by way of issuing a notification in the official gazette to add any organization in the first schedule as a terrorist organization. It is equally empowered to remove an organisation from the

first schedule. As per Section 36 the banned organization by itself or any person affected by inclusion of the organisation in the schedule as a terrorist organisation, are entitled to move an application before the Central Government for de-notification of the terrorist organization.

37. Sections 38 and 39 are extracted hereunder:-

38. Offence relating to membership of a terrorist organisation. – (1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation :

Provided that this sub-section shall not apply where the person charged is able to prove –

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

39. Offence relating to support given to a terrorist organisation. – (1) A person commits the offence relating to support given to a terrorist organisation, –

(a) who, with intention to further the activity of a terrorist organisation —

(i) invites support for the terrorist organization; and

(ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is—

(i) to support the terrorist organization; or

(ii) to further the activity of the terrorist organization; or

(iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

38. It is a well settled legal position that unless the statue clearly

excludes mens rea in the commission of an offence the same must be treated as an essential ingredient of the criminal act to become punishable **(State of Maharashtra v. Mayer Hans George; AIR 1965 SC 722, Nathulal v. State of Madhya Pradesh; AIR 1966 SC 43)**. The words "with an intent" appearing in both sections 38 and 39 of the UA(P) Act will indicate that mens rea is a necessary component of the above two sections. Second 38 deals with association with a terrorist organisation, while Section 39 deals with garnering support for the terrorist organisation, both for the purpose and intent to further the activities of the terrorist organistaion. As such there are two postulates in both Sections 38 and 39. Coming to Section 38, the first postulate is that the person should have associated himself, or professes to be associated with a terrorist organisation. Secondly his association with the organisation shall be with intention to further its activities. Unless both postulates exist together Section 38 cannot be used against any person. Coming to Section 39 the first postulate relates to the support given, inviting support in any manner, arranging, managing or assisting in arranging or managing a meeting to support the terrorist organisation, and addressing a meeting for the purposes encouraging support for the terrorist organisation. The second postulate is that all these kinds of support shall be with an intention to further the activities of the terrorist organisation. Unless both postulates exists together Section 39 cannot be used against any person.

39. Now the crucial question that emerge is that whether the "activity" mentioned in the second postulate takes into all activities whatsoever, or are limited only to those activities that have the intention of encouraging or furthering or promoting or facilitating the commission of terrorist activities.

40. The learned counsel for petitioners vehemently contended that since membership in a banned organisation ipsofacto doesn't prove involvement in terrorist act, mere association, or support given to the said organisation will not make out an offence unless it is proved that, the affiliation the accused had with the banned organisation, or the support they rendered to that organisation, was with a clear intention to further its terrorist activities. It is submitted that the prosecution doesn't have a specific case that the accused had done anything to aid, abet or facilitate the terrorist activities of the banned organisation. To the most, the materials collected by the prosecution will only prove the first postulate which by itself will not constitute an offence.

41. On the other hand the learned Prosecutor submitted that if such an interpretation as canvassed by the petitioners is allowed to stand, the terrorism would flourish and it will be difficult on the part of the State to compact it. The learned Prosecutor submitted that, whatever it be, there are sufficient materials to prove that the accused had associated with, and supported the banned organisation, with a clear intention to further the

terrorist activities of the banned organisation.

42. The contention taken up by the petitioners cannot lightly be brushed aside. What is made punishable under Section 38 is the association of any person with any terrorist organisation or his professing to be associated with that organisation when it is done with the intention of furthering the activities of that organisation. So, prima facie, mere membership in a terrorist organisation ipsofacto is not an offence either under section 38 or 39. Section 36 (2) (a) gives a clear indication in this regard. Provision is made available for de-notification of the inclusion of the organisation from the first schedule by the application of the organisation itself. That means, the organisation can be in-existence but defunct in its activities.

43. Literally the word "further" means to help the progress or development of (something). To find out the correct meaning of the word "activity" appearing in Sections 38 and 39 we have to go to Chapter IV wherein the Terrorist Act is defined. Chapter IV covers Section 15 to 23. Section 15 defines a Terrorist Act. It reads as follows:-

> 15. Terrorist act. [1] Whoever does any act with intent to threaten or liekly to threaten the unity, integrity, security, [economic security] or sovereignty or India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country, –
>
> a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or

poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause –

(I) death of, or injuries to, any person or persons; or

(ii) loss of, or damage to, or destruction of, property; or

(iii) disruption of any supplies or services essential to the life of the community in India or in nay foreign country; or

(iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]

(iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cuase death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does nay other act in order to compel the Government of India, any State Government or the Government of a foreign country or [an international or inter-governmental organization or nay other person to do or abstain from doing any act; or] commits a terrorist act.

(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.

44. Section 20 prescribes the punishment for being member of terrorist gang or organisation.

"**20. Punishment for being member of terrorist gang or organisation.**-- Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine." Here also, terrorist organisation in presenti be involved in terrorist activity.

45. When compared to Sections 38 and 39 which prescribe punishment for association and support given to the terrorist organisation, Section 20 which prescribe punishment for being member of terrorist organisation appears to be the substantive offence. Now I will find out how the Hon'ble Apex Court had interpreted these penal provisions both substantive and the related ones. Learned counsel for the petitioners relied upon four decisions of Hon'ble Supreme Court to substantiate their contentions. They are

1) People's Union for Civil Liberties and another v. Union of India (2004 (9) SCC 580),

2) Arup Bhuyan v. State of Assam (2011 (3) SCC 377),

3) Indira Das v. State of Assam (2011 (3) SCC 380) and

4) State of Kerala v. Raneef (2011 (1) SCC 784).

46. Except the last one, the other three decisions were rendered considering the relevant provisions in the earlier Anti- terrorist enactments. The decision in Arup Bhuyan and Indira Das are on Section 3 (5) of TADA

Act and PUCL Case specifically dealt with the constitutionality of various provisions under POTA Act.

47. It is to be mentioned that Section 3 of TADA and POTA are in pari materia with section 20 of UA(P) Act except for a variation in the sentence prescribed for the offence, which is immaterial for our purpose. Further Section 38 of UA(P) Act corresponds to Section 20 of the POTA and Section 39 has its trace on Section 21 of the POTA.

48. Coming to the first decision cited, PUCL challenged the constitutional validity of various provisions of the POTA Act including Section 3, Sections 20 and 21 of the said Act, through a writ petition preferred before the Hon'ble Apex Court. Hon'ble Apex Court exhaustively considered the challenge and ultimately held that the provisions are constitutionally valid subject to certain clarifications given on certain aspects. We are only concerned about the findings on Sections 3(1), 20 and 21 of the POTA Act. Para 49 of the said judgment which is relevant for our consideration, is extracted hereunder.

> *"49. Mens rea by necessary implication could be excluded from a statue only where it is absolutely clear that the implementation of the object of the Statue would otherwise be defeated. Here we need to find out whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule regarding mens rea element. (**State of Maharashtra V. M H George, Nathulal V. State***

of MP, and **Inder Sain V. State of Punjab** for the general principles concerning the exclusion or inclusion of mens rea element vis-a`-vis a given statute). The prominent method of understanding the legislative intention, in a matter of this nature, is to see whether the substantive provisions of the Act requires mens rea element as a constituent ingredient for an offence. Offence under Section 3(1) of POTA will be constituted only if it is done with an "intent". If Parliament stipulates that the "terrorist act" itself has to be committed with a criminal intention, can it be said that a person who "professes" (as under Section 20) or "invites support" or "arranges, manages, or assists in arranging or managing a meeting" or "addresses a meeting" (as under Section 21) has committed the offence if he does not have an intention or design to further the activities of any terrorist organization or the commission of terrorist acts? We are clear that it is not. Therefore, it is obvious that the offence under Section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these Sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these Sections are understood in this way, there cannot be any misuse. With this clarification we uphold the constitutional

validity of Sections 20, 21 and 22".

49. If the corresponding provisions of the UA(P) Act, are interpreted in the same manner, then it will be clear that Sections 38 and 39 are limited in its ambit only to those activities that have intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities.

50. Coming to the remaining three cases, all the judgments were delivered by a division bench of the Hon'ble supreme court consisting of the very same two judges, their lordships Justice Markandey Katju and Justice Gyan Sudha Misra. In the first two cases the appellants Arup Bhuyan and Indira Das were convicted by the designated TADA Court for being members of ULFA a banned organisation, under Section 3(5) of TADA Act on the basis of alleged confessions made by them to the Higher police officers. The Hon'ble Apex Court set aside the order of convictions and acquitted the appellants of the said charge on finding that confession is a very weak piece of evidence and it cannot safely be relied upon without corroboration, and even otherwise, Section 3(5) is not attracted to the facts of the case. Coming to the next case, State of Kerala preferred the appeal before the Hon'ble Apex Court challenging the bail granted to Raneef who was alleged to have committed the offence punishable under UA(P) Act. The allegation against him was that he had treated one of the injured assailant and harboured him. Hon'ble Apex Court dismissed the appeal and confirmed the order of bail granted to the accused. In all these cases the

Hon'ble Apex Court had taken a consistent view. It rejected the doctrine **"guilt by association"**. The Hon'ble Apex Court observed that "the Constitution is the highest law of land and no statute can violate it. If there is a statute which appears to violate it we can either declare it unconstitutional or we can read it down to make it constitutional. The first attempt of a court should be try to sustain the validity of the statute by reading it down". Thereafter the court observed that in its opinion "the provisions in various statutes i.e. 3 (5) of TADA or Section 10 of the Unlawful Activities (Prevention) which on their plain language make mere membership of a banned organization criminal have to be read down and we have to depart from the literal rule of interpretation in such cases, otherwise these provisions will become unconstitutional as violative of Articles 19 and 21 of the Constitution". Ultimately Hon'ble Apex court declared that mere membership of a banned organisation will not incriminate a person unless he resort to violence or incise people to violence or does an act intended to create a disorder or disturbance of public peace by resort to violence. To fortify this conclusions arrived at, their Lordships quoted in extensio, various judgments of the US Supreme Court. Following are the few. In **Bandenburg Vs. Ohio, 395 US 444(1969)**, US Supreme Court observed.

".....mere advocacy or teaching the duty, necessity, or propriety of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such

advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed 'to teach or advocate the doctrines of criminal syndicalism' is not per se illegal. It will become illegal only if it incites to imminent lawless action".

51. In **Scales v. United States**, 367 US 203 it is observed that, "the clause does not make criminal all association with an organisation which has been shown to engage any illegal activity. A person may be foolish, deluded, or perhaps mere optimistic, but he is not by this statute made a criminal. There must be clear proof that the defendant specifically intends to accomplish the aims of the organisation by resort of violence.

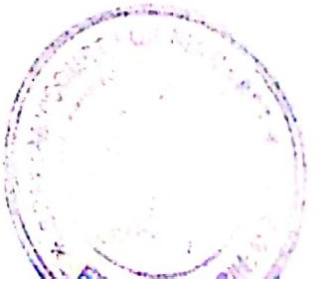
52. Being aggrieved by the interpretation placed by the Apex Court in **Arup Bhuyan's case** by adopting the doctrine of reading down the provision, the Union of India as well as the State of Assam approached the Hon'ble Apex Court for a review of the judgment, contending that if such an interpretation was allowed to stand, terrorism would spread and it would be difficult on the part of the State to control the menace. It is submitted by the learned Solicitor General that the authorities which have been relied upon in Arup Bhuyan as well as Indira Das's case, are founded on Bill of rights which is different from Article 19 of the Constitution of India.

53. Taking notice of the important issue raised by the Union of India as well as the State of Assam, a division bench of the Hon'ble Supreme

Court referred the matter to a larger bench for consideration, by order dated 26.08.2014. (**Arup Bhuyan v. State of Assam 2015 KHC 4892**). Accordingly a three Judge Bench was constituted for considering the matter in issue but so far it has not been decided. The operation of the judgment in Arup Bhuyan case or Indira Das's case has not been stayed. It is a well settled proposition that mere pendency of reference before a larger Bench cannot obliterate law holding field governing the subject, on the strength of doctrine of stare decisis. These decisions cannot be discarded by merely pointing out dissimilarity in the facts and the nature of evidence gathered. To the most it can be said that the findings on facts are distinguishable but the true principle laid down by the Apex court binds all.

54. Right now, we have to proceed in accordance with the law as declared by the Hon'ble Apex Court in the decisions cited above. Be it so, for the limited purpose of our discussion, the word "activity" appearing in the second limb of Sections 38 and 39 is to be understood as only those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities.

55. With this understanding, I will now proceed to the facts. The banned organisation in question is Communist Party of India (Maoist). It was formed in 2004 by the merger of Communist Party of India (ML), People's War Group and Maoist Communist Centre of India (MCCI). It was constituted with an aim to over throw the Government of India through



peoples war. CPI (Maoist) was designated as a terrorist organisation in the year 2009. It is still in the first schedule of UA(P) Act as entry No. 34.

56. The materials on record prima facie prove that both accused had associated with, and rendered supported to the banned CPI (Maoist) organisation. Now the question is that the affiliation the accused had with the banned organisation, and the support they rendered, were with the purpose and intend to encourage, further, promote or facilitate the commission of terrorist activities. In other words whether they resort to violence or incise people to violence or does an act intended to create a disorder or disturbance of public peace by resort to violence.

57. Learned Public Prosecutor submitted that in the earlier bail applications the trial court as well as the Appellate Court had come to a finding that, prima facie there is materials to substantiate the accusation against the accused. There is absolutely no change of circumstance. In fact more evidence were collected to fortify the prosecution case. Therefore there is no need for any further probing into the materials to see whether a prima facie case has been made out by the prosecution.

58. The said contention cannot be accepted. There is no question of any res judicata in filing bail applications. It is to be taken note that all the earlier bail applications were filed while the investigation was in progress. The present, are the first batch of applications filed after the submission of the final report. In the earlier bail applications the court was considering the

limited question whether there was sufficient materials against the accused to continue an investigation for the offences and whether release of the appellants at that stage of investigation may hamper or adversely affect the furtherance of the same. Especially in cases involving serious offences the court will take all precautions to see that investigation shall continue without any interference from the side of the accused. That stage is over and a final report has been placed before the court. Section 20 of UA(P) Act is not there in the final report. Definitely there is change of circumstance. There is no room for speculations. Report under S.173 of the Code is before the court. Now the court has to peruse the report made under S. 173 of the code and gather an opinion whether there are reasonable grounds for believing that the accusation against such person is prima facie true.

59. Prosecution has cited 93 witnesses on its side. Out of this six witnesses are protected witnesses. Only re-dacted statements of these witnesses were served to the accused. The list of documents include 92 items. Out of this two documents are referred as protected documents. Their copies were not served to the accused. The list of material objects consists of 18 items. I had perused all the materials on record including the statements of the protected witnesses and the protected documents. Broadly speaking, the evidence collected by the prosecution can be cataloged under 12 sub categories. They are

1. Pamphlets / notices / writings issued / authored by various

organisations said to be the frontal organisations of CPI (Maoist) – seized from the possession of the accused.

2. Evidence to prove the participation of the accused in the activities and programmes conducted by the so called frontal organisations.

3. Pamphlets/notices/writings issued/authored by CPI (Maoist) for distribution among public – seized from the possession of the accused.

4. Writings/banners prepared by the accused themselves for and on behalf of CPI (Maoist) for exhibiting at public place.

5. Literature/reading materials on communist ideology, Maoism etc. - seized from the possession of the accused.

6. Writings/booklets issued by CPI (Maoist) for internal circulation among its cadres – seized from the possession of the accused.

7. Evidence to prove that the accused strictly followed the instructions issued by the CPI (Maoist) in all their movements and activities.

8. Evidence to prove series of conspiracy meetings by the accused with underground part-time and professional members of CPI (Maoist).

9. Evidence to prove the strong inclination of the accused

towards extremist ideology and acceptance of the path of violence to achieve the ultimate aim of the CPI (Maoist) organisation.

10. Writings/photos/videos supporting the dissections and disruptive forces in Jammu and Kashmir who are trying to destabilize India – seized from the possession of the accused.

11. Similarity and identicalness of the materials seized from the possession of the accused and those seized in the crime registered in relation to the encounters with militant Maoist.

12. Evidence to prove that the accused are keeping files written in code language.

60. Notices favouring implementation of Professor Madhav Gadgil Report, calling upon the people to prepare for new advancement over the Adhivasi rights, to line up in the fight to regain freedom to criticize etc comes under the first category. All these relates to burning social and political issues. Nothing is there to further, or to encourage terrorist activity or facilitate its commission. Coming to the second category what is attempted to be proved is that the accused had participated in various protest marches and dharnas organised by various organisations. It includes meetings to extend solidarity to Kurdis, to protest against police attrocities, to protest against murder of one lady by name Jisha, to protest against demonetization of currency notes etc. Again, these all pertains to issues debated and discussed in the social and political sphere and all the protests

were conducted peacefully without any element of violence. Coming to the third category, the notices and pamphlets issued by CPI(Maoist) seized from the possession of the accused, also deals with the contemporary social and political issues. One document highlighted by the prosecution is the notice titled 'Maoist vettekethire janangal rangathiranguka' (People should rise against Maoist hunt) seized from the possession of the first accused. Learned Prosecutor would submit that the message of this notice is to exhort people to wage war against the State Government for killing four Communist Party of India (maoist) ideologists. On the other hand learned counsels for the petitioners would submit that the said notice only call upon the people to raise their protest against the police atrocity in the encounter killing of the Maoist. A perusal of the notice prima facie doesn't indicate any attempt to excite the people to violently protest against the government. By this notice people were not called upon to support CPI (Maoist) movement but only to protest against the government action which they claim to be wholly unjust. It is not of our concern whether the incident referred is actually a justifiable one or not.

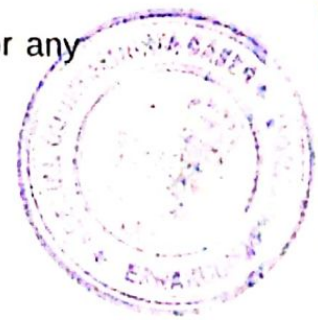
61. Coming to the fourth category, only one document is said to be prepared by the second accused for and on behalf of CPI (Maoist). That is said to be banners to be exhibited at public place to solicit support to the freedom struggle of Jammu and Kashmir, oppose the control of the Indian Government at Jammu and Kashmir and to fight against Hindu Brahmin-

Fascist Government. It is to be taken note that these banners were prepared in the aftermath of the abrogation of Article 370 and Article 35(A) of Indian Constitution by the Indian Parliament. Any evaluation diverted from the context will lead to bad conclusions. Right to protest is a constitutionally guaranteed right. It is well settled that the expression "Government established by law" has to be distinguished from persons for the time being engaged in carrying on the administration. A protest against the policies and decisions of the Government even if it is for a wrong cause, cannot be termed as sedition or an intentional act to support cession or secession. A contextual evaluation of the objectionable writings referred above, doesn't prima facie prove any attempt to create any hatred or contempt to Government of India nor does it excite any disaffection. **(Ref: the decision of our Hon'ble High Court in; Union of India through NIA, Kochi v. Shameer and others; CDJ 2019 Ker HC 331).**

62. Coming to the fifth category of evidence, possession of literature and reading materials on Communist ideology, Maoism, class struggle etc doesn't prove anything adverse to the accused. Being a Maoist is not crime, though the political ideology of Maoists does not synchronize with our constitutional polity. [**Shyam Balakrishnan v. State of Kerala and other 2015 (3) KHC 84 (Kerala High Court)**]. It becomes adverse only when there is any positive act from the side of the accused to instigate violence. Prima facie there is nothing to suggest any overt act on the side of

the accused in this regard.

63. Much emphasis was given by the prosecution regarding sixth and seventh category of evidence. A pamphlet with heading "Sathruvinte adavugalum nammude prathyakramana adavukalum" (enemies tactics and our counter tactics) seized from the possession of the second accused. It contains the precautionary and preventive directions to the underground/above ground cadres of CPI (Maoist). It also contains clear directions to the cadres of CPI (Maoist) to destroy the evidence and to act without leaving any footprints behind them. The learned Prosecutor would contend that the said seized document clearly reveal their secret agenda and their preventive measures to achieve their goal without being noted by the law enforcement agencies. It is further pointed out that the accused were strictly following these instructions while carrying out the activities of the banned organisation. To substantive this fact, the learned prosecutor pointed out that accused were caught red handed while they were attending a secret meeting of the banned organisation. At that time, in compliance of the instructions contained in the above pamphlet, they were not carrying with them their mobile phones. It is also pointed out that the call details of the SIM cards in use by the accused will reveal that they never contacted each other over phone at any point of time. All these will probabilise that the accused were members of the banned organisation and they had conspired together to further its terrorist activities, otherwise there is no need for any



secret meeting.

64. The learned counsel for the petitioners would submit that the alleged document was really a collection of different documents. Only because that the second accused was found in possession of the same, it doesn't mean that they are following the instructions contained therein. If we go by the instructions, there is a clear directive that no devices or document shall be kept in the residential house. But according to the prosecution all the documents were freely kept in the house of the accused. They were not even concealed. It is submitted that both the accused persons were students pursuing their studies. The first accused was a regular student. The second accused was working and earning his livelihood and pursuing his studies through distant education programme. Both are fully engaged in thier educational and social life. It can never be said that their movement and activities are wholly controlled by the banned organisation.

65. At this juncture, it is to be taken note that the prosecution specifically allege that there were several rounds of conspiracy meeting by the accused with underground and professional members of CPI (Maoist) organisation. Prosecution was not able to pin point with reference to the call details produced before the court, whether during these meeting times also, accused had kept away their mobile phones. It is true that anybody indulging in such activities will normally do so, clandestinely or surreptitiously. Contextually therefore, not only overt actions but covert

actions may also at times become relevant. But that doesn't take away the responsibility of the prosecution to prove the ingredients of the offence through the established means of law, either by direct evidence or by circumstantial evidence. Prima facie there exist many missing links in establishing that the accused were the cadets of CPI (Maoist) organisation and their movements and activities are controlled by the organisation. It is to be taken note that, though initially the accused were booked for the offence under Section 20 of the UA(P) Act for being member of terrorist organisation, after the completion of the investigation, Section 20 was dropped from the charge sheet. Right now, even the prosecution doesn't have a case that accused are the members of the banned terrorist organisation. Therefore, prima facie it cannot be said that accused are the cadets of CPI (Maoist) party and their movements and activities are fully controlled by the internal circulars issued by the banned organisation. Since there is not even a single allegation of violent overtact against the accused, at this stage, possession of an internal document of the banned organisation, to the most, only indicate a leaning on the side of the accused towards this banned organisation.

66. The second accused was found in possession of soft copies the constitution of CPI(Maoist), its flag, a weekly published by CPI(Maoist) and such other documents. It is pointed out by the learned counsel for petitioners that those extraneous materials are in the public domain and

even available in the internet, for eg: website of South Asia Terrorism Portal (satp.org). Any way, since no specific violent overtacts are attributed against the accused, at this stage, it is not possible to prove any nexus in between the accused and the terrorist activities of the organisation.

67. Coming to the eighth category of evidence, the prosecution was only able to prepare certain mahazars of some meeting sites as pointed out by the accused. There are no other materials to prove the presence of the accused in any of these places at any point of time. At this stage the pointing out mahazars cannot draw much evidentiary value.

68. Coming to the ninth category, prosecution tried to prove this fact through the oral statement of persons who had acquaintance with the accused. None of these witnesses had given any specific statement to the effect that accused 1 and 2 are the members of the banned organisation and they had in any way aided or abetted the terrorist activities of the banned organisation. To the most their evidence will only indicate that accused are attracted towards Maoism.

69. The learned Prosecutor would submit that the materials on record will prove that the absconding third accused Usman was an active member of CPI (Maoist) and he is involved in three criminal cases, all charged under UA(P) Act. There is evidence to prove that the first accused had frequently met him and they had deliberated and discussed the organizational matters of the banned outfit. Further the notebook seized

from the possession of A1 contained incriminating writings to over throw the Government through violence. According to the Prosecutor the above evidence is prima facie sufficient to prove that the accused had conspired together to further the terrorist activities of the banned organisation.

70. Document Nos.42 to 44 relates to the crime No.178/2013, 67/2013 and 74/2013 registered against the third accused before Manthavady, Pullpally and Thirunelli police stations. The allegations therein doesn't give any indication that the third accused had indulged in any violent or terrorist activities. The allegation is that he had distributed notices supporting CPI (Maoist). Two cases are with regard to the distribution of one and the same notice. The contents of the notice suggest that A3 solicited support from the pubic to the Maoist organisation who are fighting to establish a neo democratic India. There is nothing to instigate terror or to entice violence to achieve the object. It is true that A3 had fled away from the place on seeing the police party. Admittedly non-bailable warrants are pending against him in criminal cases. That may be the reason for running away from the place. At this stage it will not be proper to infer that he is a militant Maoist indulged in terrorist activity. Consequently meeting A3 frequently doesn't indicate that the accused were planning for an imminent terrorist attack.

71. Coming to document No.63 notebook, it is in fact a private diary of the first accused. He had scribbled many things in the diary on various

subjects. In one page he had penned about the strategies regarding fighting a war against the Government using AK 47 weapons. The objectionable writing in Malayalam, if translated in English reads as follows: "Fight with guns, fight against the government, together as one power. As the bullets fire from AK47 gun, each bullet against the police. When the enemy attacks, we withdraw. When the enemy rests, we disturb. When the enemy withdraws we attack. When the enemy is gone, we move forward. A new world awaits. Hold on to the guns, the time to pull the trigger is here."

72. The learned counsel for the first accused raised two fold contentions against receiving and relying upon this diary in evidence. Firstly being a private diary it is not admissible in evidence. Secondly, to the most, the scribblings represent only his anguish mind and wild thoughts and not his actions, therefore no evidentiary value can be attributed to these writings.

73. The first contention cannot be accepted. Hon'ble Apex Court in **PUCL v. Union of India (2004 (9) SCC 580)** made it clear that right to privacy is subservient to that of security of State.

74. To answer the second contention, it is to be looked into whether the objectionable writings in the notebook reflects his immature thoughts or else it reflects a preparation to act. A diary is a place where you record events, experiences, and the other personal things that interest you, hurt you or pain you. You can write about whatever you like, free of outside

judgment or criticism. It should be an extension of mind; safe and free. If the writings relates to an event or experience, definitely it gains much evidentiary value. But if it is simply writing down one's thoughts and feelings it will take us no where in drawing any definite conclusions. Even stray incidents of gross injustice, violation of basic human rights, disturb one's mind though he is not directly affected. In such situations mind often revolts, intrusive thoughts flow into. All these will generate emotional tension, stress and strain. One among the several outlets to relieve emotional tension and stress, is writing diary. Some will jot down everything that they feel. It is a process of cleansing or purging one's emotions out on paper.

75. If we come back to the objectionable writing, it is not related to any specific event or experience. It doesn't indicate a blue print to carryout an attack in near future. It appears to be a generalized overview of Maoist ideology about people's revolution. To the most the said scribbling proves his leaning towards this ideology. A provocative thought ipsofacto doesn't prove preparation for a crime. The preparation consist of devising or arranging the means or measures necessary for the commission of the offence. These requirements are necessary to make it out an offence. There is no case for the prosecution that either before the writing of this statement in the diary or subsequently, the first accused had indulged in any violent act. In this regard two aspects needs a mention. Firstly section 20 of the UA(P) Act has been dropped from the final report. That means even the

prosecution doesn't have a case that the first accused is an active member of the banned organisation. Secondly the first accused is having some psychiatric issues for which he had taken treatment as evident from the copies of the prescription produced along with his bail application. He was treated for depression and mood disorder. He was under medication. May be he was emotionally tense. This possibility cannot be completely ruled out. Since there is no overtact of violence attributed against the first accused, at this stage, the said scribbling in his diary doesn't satisfy that he had accepted and adopted the path of violence.

76. In the same way, one instance pressed against the second accused is that he had shouted slogans supporting Maoism, Nexalbari etc. when the police searched his house. Here also no violent overtact is attributed against the second accused. Shouting slogans can only be taken as his inclination towards Maoist ideology but it cannot be an indication that he stepped into the path of violence to achieve the objectives.

77. Coming to the tenth category, as I stated earlier the provocative statements made with regard to Jammu and Kashmir is to be evaluated contextually. It was made in the aftermath of the abrogation of Article 370 and 35(A) of the Indian Constitution. At this stage, the objectionable contents cannot be read against the accused in finding out a prima facie case.

78. Coming to the eleventh category, the only case of the

prosecution is that some books and voice clips found in the possession of the accused were also found in the possession of militant members of CPI (Maoist) who were killed in encounter. These books and video clips are not prohibited ones or banned items. Therefore, at this stage the above link evidence doesn't prima facie prove the culpability of the accused in promoting terrorist activity.

79. Coming to the twelfth category, the notepads and pocket diary seized from the possession of the accused contains some account statements and scribbling in Malayalam using short words and abbreviations. At present there is no other evidence to link these writings to any secret activity carried out by the accused to further the terrorist activities of the banned organisation.

80. At this juncture it is apposite to find out, how various courts in similar situations, had gone into the question of prima facie case while considering the bail applications. In **Konneth Muraleedharan v. State of Maharashtra** (Crl.Bail Application No.488/2018) Hon'ble Bombay High Court granted bail to Muraleedharan who is alleged to have committed the offence punishable under Section 20 of UA(P) Act. He was alleged to be a member of banned CPI (Maoist) organisation and he was found in possession of literature of banned organisation, a forged pancard, a merger declaration of Communist Party of India (Maoist) and Communist Party of India (Maoist/Leninist) Naxalbari from his house. More incriminating

materials, which includes 10 mobile instruments with 15 SIM cards, were also seized. The handwriting expert identified the signature of the appellant on the merger document. Still, the court prima facie found that the seizure of those incriminating materials are not sufficient to infer the indulgence of the appellant in a terrorist act, as a member of a terrorist organisation. Accordingly the Hon'ble High Court granted bail to the accused. The said order was confirmed by the Hon'ble Supreme Court by dismissing the Special Leave to Appeal No.4822/2019 filed by State of Maharashtra.

81. In **Vishwant @ Vishnu Varadharajan Iyyer v. State of Gujarat** (Crl.M.P. 12435 to 12464 of 2010 order dated 18.11.2010) the Hon'ble Gujarat High Court granted bail to the accused who was found in possession of documents such as agenda of a meeting, in which one of the item was to pay homage to a dead nexalvadhi who was killed in an encounter and some literature about revolution and lessons of Communist Party of India (ML) containing inter alia features of gourrilla, warfare etc. The court prima facie observed that possession of such materials without any overtact or actual execution of such ideas by itself would not form or constitute any offence.

82. In the case of **P.Nedumaran and others v. State of Tamil Nadu (MANU/TN/1825/2003)** the Hon'ble High Court of Tamil Nadu granted bail to the accused therein who were charged for offence under Section 21 of POTA for conducting a meeting in support of LTTE a proscribed terrorist

organisation, for the reason that there was no overtact attributed to any of the accused intended to commit terrorist activity.

83. In **Kanchan Mishra @ Anu v. State of NCT of Delhi (2012 (130) DRJ 646)** the Hon'ble High Court of Delhi granted bail to the appellant who was charged for the offence under Section 10, 13, 18 and 20 of UA(P) Act holding that though some of the documents recovered show incitement even towards violence, however the documents in the handwriting of the petitioner do not reveal incitement for violent activity. The Hon'ble High Court took the view that mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.

84. In **Jyoti and others v. State of Maharashtra** (Crl. Bail Application No.1020/2012 and 1066/2012 Hon'ble High Court of Bombay) granted bail to two accused persons who are charged for the offences punishable under Section 20, 38 and 39 of the UA(P) Act. They were alleged to be members of CPI (Maoist) Party. They were found in possession with provocative publicity materials of CPI (Maoist) Party. Digital evidence were also extracted from the electronic gadgets seized from their possession. But there were no materials to prove that they had indulged in terrorist activities or supported and aided such activities. In that circumstances the court held that the prosecution failed to establish a prima facie case hence Section 43D (5) is not applicable and ultimately they were

granted bail.

85. Hon'ble Bombay High Court further observed as follows:-

"A number of persons are influenced, and get attracted towards the Maoist Philosophy because of the oppression of the weaker section which they might have experienced in the social set up. The applicants also, like a number of such persons, might have been influenced and impressed by the Maoist philosophy. It has been recognized even by the committees appointed by the government to study the problem of naxalites that it is the social, political, economic and cultural discrimination faced by the poor, that is throwing a large number of discontended people towards the Maoists. It is impossible to hold that all such persons are to be treated as members of a terrorist organization, or that they are liable to be punished for having some faith in such philosophy, or for having sympathy for those who propagate such philosophy. It is in this context, that the concept of active membership and passive membership has been judicially evolved.

Since none of the applicants is said to have indulged into any acts of violence or of being a party to any conspiracy for committing any particular violent act or crime, they cannot be held, prima facie, to have committed the offences in question. Though it appears that they had come in contact with the members of the said organization, and

were perhaps learning about the philosophy and ideology of the said organization, they cannot be prima facie held as offenders. Even if they were impressed by the said philosophy and ideology, still they cannot be said to be members - much less such members as would attract the penal liability - of the said organization. There does not seem to be a prima facie case against the applicants even in respect of an offence punishable under section 38 of the UAP Act, which expands the scope of the criminal liability attached to the membership of a terrorist organization, inasmuch as, the mens rea in that regard, should necessarily be with respect to such activities of the organization as are contemplated in section 15, and made punishable by sections 16 to 19 of the UAP Act."

86. Definitely a doubt will arise is it not an offence to be a member of a banned terrorist organisation. A banned terrorist organisation can exist only in a defunct stage till the ban is lifted. Carrying out activities in its name invites an offence within the meaning of Section 10 of UA(P) Act. (see **Union of India v. Shameer and others CDJ 2019 Ker.HC 331**). Further, preventive detention under National Security Act, 1980 can also be resorted to against persons who try to activate the banned organisation. Section 10 of the UA(P) Act is comparatively a minor offence. The punishment prescribed is only two years. What we have discussed earlier is that whether mere membership or the support rendered to a banned

organisation ipsofacto attract the grave offences punishable under Section 38 and 39 of the UA(P) Act. Needless to say that graver the offence, greater should be the care taken to see that the offence must strictly fall within the four corners of the provision. The stringent provisions of UA(P) Act coupled with enhanced punishment prescribed for the offences under the Act make the task of the designated court more onerous. It is in that context, the question posed above was answered in the negative as far as Sections 38 and 39 of the UA(P) Act is concerned.

87. On evaluating the materials placed on record for the limited purpose of the disposal of bail applications, it appears to me that even though the prosecution was able to establish the first postulate of Sections 38 and 39 that the petitioners/accused had associated with and supported CPI(Maoist) organisation, it is doubtful whether the prosecution has made out a prima facie case regarding the second postulate that the affiliation and support rendered by the petitioners/accused to the banned organisation were done with intent to encourage, further, promote or facilitate the commission of terrorist activities. In other words the petitioners/accused were able to bring out a rational and reasonable doubt on the question of prima facie case. Hence, this court will not be precluded from granting bail to the petitioners/accused if they are otherwise entitled for the same. The bar under Section 43D(5) stands lifted.

88. Next offence charged against the accused is under 120B of

IPC. There is no allegation by the prosecution that the accused conspired to do any specific terrorist act. The allegation is general in nature. It is alleged that they conspired to further the activities of the terrorist organisation. Our Hon'ble High Court in **A.Ramachandran @ Raman v. CBI (2015 (3) KHC 678)** observed that *"as far as the charge of criminal conspiracy is concerned we are of the opinion that before the examination of the prosecution witnesses, which are yet to begin, and before the conspiracy part is proved conclusively it will be difficult for us to form an opinion that the accusations are prima facie true"*. The said observation squarely applies to the facts of the present case.

89. The remaining offence is under Section 13 of UA(P) Act charged against A2. The allegation is that he had prepared banner supporting secession of Kashmir from the Indian Union and this amounts to an unlawful activity. Right to protest is a constitutional right. Here the objectionable banner relates to Jammu and Kashmir issue. It was raised in the aftermath of the abrogation of Article 370 and 35 (A) of the Constitution of India. This context is to be kept in mind. As I stated earlier, evaluation diverted from the context will lead to bad conclusions. I don't find it necessary to go into the details. It is only to be observed that, at this stage, it will be difficult for this court to form an opinion that the accusations are prima facie true.

90. Now I will consider the aggravating and mitigating

circumstances pointed out by both sides. On the basis of broad probabilities, I had examined the prosecution case, the nature and gravity of the accusations, its severity, the nature of evidence collected by the prosecution to prove its case, and found that there exists rational and reasonable doubts on the question of prima facie case. Other aggravating circumstances pointed out by the prosecution are; firstly if the accused are enlarged on bail there is every chance that they will abscond, secondly they will influence and threaten the witnesses, thirdly they will indulge in similar crimes and more importantly there is danger, of justice being thwarted by grant of bail. The mitigating circumstances pointed out are; that both petitioners are of young age, they are students of Law and Journalism, they have absolutely no criminal antecedents and that the prosecution was not able ot point out even a single instance wherein the petitioners have resorted to violence. It is submitted that the petitioners have no influential background and they are ready to abide whatever lawful conditions imposed by the court if the court is pleased to enlarge them on bail.

91. As observed by Hon'ble Bombay High Court a number of persons are influenced, and get attracted towards the Maoist Philosophy because of the oppression of the weaker section which they might have experienced in the social set up. It is impossible to hold that all such persons are to be treated as members of a terrorist organization, or that they are liable to be punished for having some faith in such philosophy, or

for having sympathy for those who propagate such philosophy.

92. One of the strategy to fight against terrorism is to dissuade disaffected groups from embracing terrorism. In **PUCL's case (2004 (9) SCC 580)** Hon'ble Apex Court in Para 12 observed *"therefore, the anti-terrorism law should be capable of dissuading individuals or groups from resorting to terrorism"*.

93. At this juncture the observations made by the Apex Court in **Shaheen Welfare Association v. Union of India ((1996) 2 SCC 616)**, in relation to grant of bail to under trials in TADA Cases gains relevance. The Apex Court has held as follows:-

> *[12]. The proper course is to identify from the nature of the role played by each accused person the real hardcore terrorists or criminals from others who do not belong to that category; and apply the bail provisions strictly in so far as the former class is concerned and liberally in respect of the latter class. This will release the pressure on the courts in the matter of priority for trial. Once the total number of prisoners in jail shrinks, those belonging to the former class and, therefore, kept in jail can be tried on a priority basis. That would help ensure that the evidence against them does not fade away on account of delay. Delay may otherwise harm the prosecution case and the harsh bail provisions may prove counter-productive. A pragmatic approach alone can save the situation for, otherwise, one may find that many of the under trials may be found to have completed the maximum punishment provided by law by being in jail without a trial. Even in cases where a large number of persons are tied up with the aid of Sections 120B or 147, I.P.C, the role of each*

person can certainly be evaluated for the purpose of bail and those whose role is not so serious or menacing can be more liberally considered. With inadequate number of courts, the only pragmatic way is to reduce the prison population of TADA detenus and then deal with hardcore under trials on priority basis before the evidence fades away or is lost. Such an approach will take care of both the competing interests. This is the approach which we recommend to courts dealing with TADA cases so that the real culprits are promptly tried and punished.

[13]. For the purpose of grant of bail to TADA detenus, we divide that under trials into three classes, namely -

(a) hardcore under trials whose release would prejudice the prosecution case and whose liberty may prove to be a menace to society in general and to the complainant and prosecution witnesses in particular;

(b) other under trials whose overt acts or involvement directly attract Sections 3 and/or 4 of the TADA Act;

(c) under trials who are roped in, not because of any activity directly attracting Section 3 and 4, but by virtue of Section 120B or 147, I.P.C, and;

(d) those under trials who were found possessing incriminating articles in notified areas and are booked under Section 5 of TADA.

94. Petitioners herein will not come under the first three categories mentioned in the above decision. Petitioners doesn't have any influential background. They belongs to middle class family. I don't find any danger, of justice being thwarted by granting bail to the petitioners.

95. Here the petitioners are budding youngsters. At the time of arrest the first accused was just 19 years old. The second accused was 23 years of age. The first accused was a student of Law. The second accused was a student of Journalism. It appears that they used to be pro-active on each and every contentious social and political issues. Such persons will be more prone to extremist ideologies and probably that may be the reason for the petitioners to come in contact with the banned organisation. Petitioners are having no criminal antecedents. Available records reveal that petitioners are young men with a possibility of reforming themselves. Therefore, to some extend the court has to be lenient to them on the question of granting bail but with a clear message that the chance given for reformation shall not be mistook as an opportunity to fasten their bond with banned terrorist organisation and to be part of it. One cannot have recourse to violent methods to overawe a democratically elected government or legally formed governmental machinery, even though peoples are been tempted to have recourse to such things. Let us hope that, the parents of the petitioners would play a constructive role in the betterment of the mental and psychological qualities of the petitioners.

96. To advert to the concern raised by the learned Prosecutor that if granted bail, petitioners/accused will abscond, they will influence and threaten the witnesses and that they will indulge in similar crimes, Most of these apprehensions can be alleviated by imposing stringent conditions in

the bail order.

97. Both the petitioners are in judicial custody from 02.11.2019 onwards. Period has crossed beyond ten months. Being a new case it takes time to even start the trial. The learned Public Prosecutor submitted that trial can be started at the earliest and he will fully co-operate in disposing the case at the earliest. But it is not possible to immediately start the trial since forensic reports and report regarding voice test are being awaited. A prolonged incarceration of the petitioners till the disposal of the case doesn't appears to be inevitable. As held by the Hon'ble Apex Court in **State of Kerala v. Reneef in (2011 (1) SCC 784**) the delay in concluding the trial is one of the important mitigating factors in deciding whether to grant bail. The discussions made above will reveal that the mitigating circumstances out weigh the aggravating circumstances.

98. Ultimately, considering the facts and circumstances of this case, balancing the aggravating and mitigating circumstances, and taking care of the competing rival interests, I find that the judicial discretion available with this court, is to be exercised in granting bail to both petitioners/accused subject to the conditions to be imposed for ensuring a fair trial and safeguarding the legitimate interest of the prosecution. The above points are answered accordingly.

In the result, both petitions are allowed as follows:-

1. Petitioners/accused 1 and 2 are directed to be released on bail

on each of them executing bonds for ₹1 lakhs each with two solvent sureties each for the like amount.

2. One of the sureties of each petitioners shall be the parent of the respective petitioner and other surety shall be a near relative of the respective petitioner.

3. The petitioners/accused shall not directly or indirectly make any inducement, threat or promise to any persons acquainted with the facts of the case so as to denude such person from disclosing such facts to the court or to the investigating agency or to any police.

4. The first petitioner Allen Shuhaib shall report before the Panniyamkara police station within whose limits he resides, on the first Saturday of every month in between 10 am and 11 am until further orders.

5. The second petitioner Thwaha Fasal shall report before the Pantheerankavu police station within whose limits he resides, on the first Saturday of every month in between 10 am and 11 am until further orders.

6. Petitioners shall make themselves available for any further investigation by NIA if so required, and regularly attend this court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate

application.

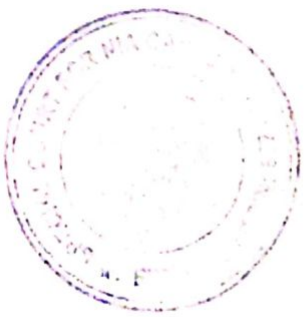
7. The petitioners shall surrender their passports if any to this court before their actual release. In case they are not holding any passport, shall file an affidavit before this court.

8. The petitioners shall not leave the territorial limits of State of Kerala without the prior permission of this court.

9. The petitioners shall not indulge in any criminal activities while on bail nor shall in any manner associate with or support the banned CPI (Maoist) and all its formations.

10 SHO, Panniyankara police station is directed to monitor the first petitioner Allen Shuhaib and if he finds the first petitioner involved in any criminal activity or in any way associated with or supporting the banned CPI (Maoist) or any of its formations, the police/investigation agency is at liberty to bring it to the notice of this court through the Public Prosecutor.

11. SHO, Pantheerankavu police station is directed to monitor the second petitioner Thwaha Fasal and if he finds the second petitioner involved in any criminal activity or in any way associated with or supporting the banned CPI (Maoist) or any of its formations, the police/investigation agency is at liberty to bring it to the notice of this court through the Public Prosecutor.



12. In case of violation of any conditions, prosecution may ask for cancellation of bail.

Dictated to the Confidential Asst., transcribed and typed by her, corrected and pronounced by me in open court on this the 9th day of September, 2020.

Sd/-
Anil.K.Bhaskar
Judge, Special Court for NIA Cases

Appendix: Nil

Id/-
Judge, Special Court for NIA Cases
(By Order)

Sheristadar

Typed by: Sindhu.S.T.
Comp.by:

Order in Crl.MP No.55/2020
&
Crl.MP No.56/2020
in
SC No.01/2020
Dated: 09.09.2020